No. 86-738

In the Supreme Court of the United States

OCTOBER TERM, 1986

CAUCUS DISTRIBUTORS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a motion to purge contempt constitutes a motion under Fed. R. Civ. P. 59(e) "to alter or amend" a judgment and thus tolls the time within which to appeal from a contempt judgment.

2. Whether petitioner Caucus's due process rights were violated when the district court refused to permit it to present live testimony during a contempt hearing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 795 F.2d 226.

JURISDICTION

An order of the court of appeals dismissing petitioners' appeal from the March 29, 1985, contempt judgment of the district court was entered on December 5, 1985. The judgment of the court of appeals disposing of petitioners' other appeals from various district court orders was entered on July 3, 1986, and a petition for rehearing was denied on August 5, 1986 (see Pet. App. A17-A18). The petition for a writ of certiorari was filed on November 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, four organizations associated with Lyndon LaRouche, are the subjects of a grand jury investigation

into allegations of credit card fraud. After petitioners failed to comply with grand jury subpoenas duces tecum, they were held in civil contempt and fined $10,000 for each day of noncompliance. Additionally, when petitioner Caucus Distributors, Inc. (Caucus) refused to comply with an order compelling it to produce certain records to the grand jury, it was separately adjudged in contempt and was fined an additional $5,000 per day.

1. The complex procedural history of this case is summarized in the opinion of the court of appeals (Pet. App. A1-A16). On January 30, 1985, United States Marshals attempted to serve grand jury subpoenas on petitioners at their New York headquarters. Service was refused. Thereafter, on February 6, 1985, one day before the return date of the subpoenas, Marshals again attempted to serve the subpoenas, this time leaving them with a receptionist who stated that she was authorized to accept service. Nonetheless, no witnesses for petitioners appeared before the grand jury the next day. The United States Attorney adjourned the return date on the subpoenas until February 14, but no witnesses for petitioners appeared on that date, either. Pet. App. A2-A3.

The government then moved for an order to show cause why petitioners should not be held in contempt and served the motion on petitioners. The district court granted the motion and set a hearing for March 29, 1985. On March 19, the order to show cause was served on a woman at petitioners' office who stated that petitioners would receive the order from her. Again, however, no representative of any of the petitioners appeared at the March 29 hearing. At the close of the hearing on that date, the district court found that each of the petitioners had been properly served and that their failure to comply with the subpoenas was without just cause. The court therefore held peti-

titioners in contempt and ordered each to pay $10,000 per day until it complied with the subpoenas. The court stayed its order until April 2, 1985. Pet. App. A3, A19-A20.

On April 3, 1985, petitioners, still not in compliance with the grand jury subpoenas, moved to vacate the contempt order and quash the subpoenas. Following a hearing on that date, the district court denied the motion, finding once more that petitioners had been adequately served. On the following day, April 4, petitioners made a new motion, this time to "purge contempt and sanctions." In their motion papers, petitioners agreed to accept service to appear before the grand jury. On April 9, 1985, the district court ruled that in light of petitioners' acceptance of service of process, it would "defer action on [petitioners'] motion pending notice * * * from either party that a hearing before the Grand Jury has been scheduled." In the days that followed, however, petitioners continued their noncompliance with the subpoenas. Accordingly, on April 22 the district court entered a partial judgment of $70,000 against each of the petitioners for failure to comply with the subpoenas during the period between April 2 and April 8, 1985. Pet. App. A3-A4, A21-A22.

On May 2, 1985, petitioners moved for reconsideration of the April 22 orders of partial judgment and represented to the court that they had commenced compliance with the subpoenas on April 18. On May 21, however, petitioners once again moved to quash the subpoenas. On July 19, 1985, the district court denied petitioners' April 4 motion to purge contempt, their May 2 motion to reconsider the court's entry of partial judgment, and their May 21 motion to quash the subpoenas.

On August 2, 1985, petitioners appealed the district court's March 29 contempt judgment, the April 22 partial judgment of $70,000, an order authorizing the government to register the March 29 contempt judgment in the Southern District of New York, and those parts of the July

19 order that denied the motions to reconsider the partial judgment and to quash the subpoenas. In an unpublished order issued on December 5, 1985, the court of appeals dismissed as untimely petitioners' appeal of the March 29 contempt judgment and held that the trial court's July 19 order denying petitioners' motion to quash the subpoenas was not appealable. Pet. App. A4.

2. In addition to the subpoenas noted above, the grand jury also subpoenaed from petitioner Caucus certain index cards listing the names of potential and actual donors to petitioners' enterprises. The records custodian for Caucus refused to produce the cards, claiming they were not in petitioner's possession but rather were maintained by independent fundraisers, who were not Caucus employees. Pet. App. A10. On November 12, 1985, the government moved for an order to compel production of the index cards. It asserted that the cards were producible as corporate documents. Caucus contended that the cards were the personal property of the individual fundraisers and that production of the cards would infringe the fundraisers' First and Fifth Amendment rights. In support of that claim, Caucus attached detailed affidavits from two Caucus fundraisers and from third parties who had lent money to the LaRouche campaign. Caucus also submitted letters prepared by attorneys for various LaRouche fundraisers, asserting that their clients were the personal owners of the index cards. Pet. App. A10-A11, A15.

On November 22, 1985, the district court granted the government's motion to compel. The court found that the index cards were producible as Caucus's corporate documents and held that Caucus's continuing refusal to produce the records would lead to additional sanctions.[1]

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[1] In its November 22 order, the district court also entered a second partial judgment of $150,000 against each of the petitioners for their continuing failure to comply with the earlier grand jury subpoenas between April 9 and April 25, 1985.

Thereafter, Caucus sought a protective order limiting the government's investigative use of the cards. On December 6, the district court denied that motion.

On December 11, the government moved for the imposition of a $5,000 per day assessment against Caucus for its failure to comply with the November 22 order to compel.[2] In opposition, Caucus asked the district court to reconsider its November 22 holding that the index cards were corporate documents. Caucus offered to present certain of its fundraisers as witnesses, as long as the court prohibited the government from serving personal subpoenas on those witnesses during the time they were in Boston. After hearings on December 30, 1985, and January 17, 1986, during which no testimony was taken, the district court granted the government's motion for sanctions. The court ordered Caucus to pay an additional $5,000 for each day of noncompliance with the grand jury subpoena for records. Pet. App. A10, A12-A13.

3. The court of appeals affirmed in part and reversed and remanded in part.[3] The court rejected as untimely (Pet. App. A5-A6) petitioners' challenge to the partial judgment of contempt issued on April 22. In so holding, the court noted, first, that its December 5, 1985, order dismissing as untimely that portion of petitioners' appeal directly attacking the March 29 contempt order was binding as the law of the case (Pet. App. A5). The court

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[2] In addition, the government requested a third partial judgment against all four petitioners arising from the March 29 contempt order. The district court granted that application. Pet. App. A8.

[3] The court of appeals reversed that portion of the trial court's decision refusing to annul the certification of the March 29 contempt judgment for purposes of registration in the Southern District of New York. The government had sought the certification so that certain of petitioners' bank accounts could be frozen (Pet. App. A4). The court of appeals held that the certification was premature, in that it was entered before the 60-day appeal period after the entry of the March 29 judgment had elapsed (Pet. App. A6-A8).

reasoned, further, that since petitioners' challenge to the April 22 judgment was predicated on the same objection that they had belatedly raised to the underlying contempt judgment of March 29, petitioners were precluded from relying on that objection in challenging the April 22 order. The court rejected petitioners' claim that their time to appeal the March 29 order had been extended, under Fed. R. App. P. 4(a)(4), by the April 4 motion to purge contempt. While Rule 4(a)(4) permits a tolling of the time to appeal where, inter alia, a party has made a motion under Fed. R. Civ. P. 59(e) "to alter or amend [a] judgment," the court held that petitioners' April 4 motion to purge contempt "was not meant to alter the [March 29] judgment, rather it was an attempt to obey the contempt order and stop the accumulation of the fine. As such, it could not toll the time for appeal" (Pet. App. A5).[4]

The court of appeals also rejected petitioner Caucus's challenge to the district court's order holding it in contempt for failing to produce the index cards. The court held that the district court did not deprive Caucus of due process by refusing to permit it to present live testimony during the contempt hearings. Pet. App. A15-A16. The court of appeals noted (Pet. App. A16) that Caucus's position had been set out in the affidavits and letters and that

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[4] In denying petitioners' petition for rehearing (Pet. App. A17-A18), the court of appeals noted that on April 3—the day before petitioners moved to purge contempt—they had expressly moved under Fed. R. Civ. P. 59 to vacate the March 29 contempt order and quash the subpoena. That motion was denied on April 3. The court thought it "unlikely that [petitioners] would have filed the exact same motion the very next day" (Pet. App. A17). Moreover, the court noted, the district court had not treated the April 4 motion as a Rule 59 motion: rather than summarily denying it as duplicative of the April 3 motion, the court had agreed to delay its ruling on that motion so as to give petitioners an opportunity to obey the subpoenas, as they had indicated they would (Pet. App. A17-A18).

additional testimony would likely have been repetitive. Moreover, the court observed, there was a "real possibility" that the witnesses would not have appeared at all, particularly in light of Caucus's insistence that the witnesses be protected from service of process during their appearance in Boston. The court concluded that in view of "the overall delay in the grand jury proceedings already caused by [petitioners'] refusal to produce anything until forced to do so * * * the [trial] court's decision to deny an evidentiary hearing did not violate Caucus' due process rights" (Pet. App. A15-A16).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners contend (Pet. 5-10) that the court of appeals indulged an "overly technical reading" of Fed. R. App. P. 4(a)(4) (Pet. 6) in holding that petitioners' August 2, 1985, appeal of the district court's March 29, 1985 contempt judgment was untimely. Petitioners claim that, although not denominated as such, their April 4 motion to purge contempt was in reality a motion "to *vacate* both the contempt judgment and sanctions" and thus should have been construed as a motion under Fed. R. Civ. P. 59(e) (Pet. 7 (emphasis in original)). This claim is meritless.

As a threshold matter, petitioners' effort to seek review of the court of appeals' dismissal of the appeal from the March 29, 1985, contempt judgment is itself untimely. The court of appeals dismissed that appeal on December 5, 1985. The time for seeking review of that dismissal order therefore expired on March 5, 1986. To be sure, the court of appeals explained the basis for the December 5, 1985, dismissal in both its July 3, 1986, opinion and its August 5, 1986, order on rehearing. But those orders did not

revive petitioners' right to seek review of the December 5 dismissal order, since the court in those subsequent orders "did no more * * * than to restate what it had decided by the first one." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); see also *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984); *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211 (1952).

Even if the petition were timely with regard to this issue, the issue would not warrant this Court's review. Under Fed. R. App. P. 4(a)(1) petitioners had 30 days within which to file their notice of appeal from the district court's March 29, 1985, judgment of contempt. Had petitioners moved during that 30-day period to alter or amend the March 29 judgment pursuant to Fed. R. Civ. P. 59(e), that motion would have tolled the time for appeal. But not every motion made after a judgment has been entered falls within the purview of Rule 59(e). Rather, a Rule 59(e) motion—"to alter or amend" the judgment—must "question[] the substantive correctness of [the] judgment" (*Willie* v. *Continental Oil Co.*, 746 F.2d 1041, 1045 (5th Cir. 1984)). Accord *Vreeken* v. *Davis*, 718 F.2d 343, 345 (10th Cir. 1983); *St. Paul Fire & Marine Ins. Co.* v. *Continental Casualty Co.*, 684 F.2d 691, 693-694 (10th Cir. 1982). Here, the court of appeals correctly looked to the "substance" of petitioners' April 4 motion to purge contempt (Pet. 6) and held that it did not constitute a Rule 59(e) motion. As the court noted in denying the petition for rehearing (Pet. App. A17-A18), petitioners could not have intended the April 4 motion to seek an alteration or amendment of the contempt judgment, because only the previous day the district court had denied just such a motion and "[i]t seems unlikely that [petitioners] would have filed the exact same motion the very next day" (Pet. App. A17). Instead, as the court of appeals held, the motion to purge "was an attempt to obey the contempt order and

stop the accumulation of the fine" (Pet. App. A5). That was how the district judge treated the motion, since he agreed to delay further contempt orders in order to gauge petitioners' promised compliance with the subpoena (Pet. App. A18). Accordingly, the April 4 motion did not toll the time for appeal.[5]

2. Petitioner Caucus also contends (Pet. 10-15) that the district court denied it due process by refusing to permit it to present live testimony prior to holding it in contempt for failing to produce the subpoenaed index cards. The court of appeals properly rejected that contention.

As the court of appeals noted (Pet. App. A13), "due process requires that a potential contemnor be given notice and a hearing" before being held in contempt. See *In re Oliver*, 333 U.S. 257, 275 (1948). Here, petitioner received ample notice prior to the contempt citation and participated in two separate hearings—on December 30, 1985, and January 17, 1986 (Pet. App. A12). At the hearings Caucus submitted detailed affidavits from allegedly independent Caucus fundraisers, asserting that the records in question were in the fundraisers' exclusive possession (Pet. App. A11). Caucus also furnished the district court with numerous letters from attorneys who claimed that the index cards were the property of individual fundraisers (Pet. App. A15).

Petitioner nevertheless insists that the district court should have permitted it to supplement the record with live testimony buttressing its claim. The court of appeals, consistent with each of the other courts of appeals that has addressed the issue, held that such an evidentiary hearing is

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[5] The decision of the court of appeals is in accordance with the well-settled principle that motions seeking nothing more than relief from the effects of a judgment do not toll the time for appeal. *E.g.*, *Gibbs* v. *Maxwell House*, 701 F.2d 145, 146 (11th Cir. 1983); *American Security Bank* v. *John Y. Harrison Realty, Inc.*, 670 F.2d 317, 321 (D.C. Cir. 1982).

not required (Pet. App. A15-A16). Accord *In re Kitchen,* 706 F.2d 1266, 1273 (2d Cir. 1983) ("the district judge may require that before a third party is permitted to take the stand, an offer of proof demonstrating the relevancy of the proposed testimony be made and, considering the exigencies of any grand jury proceeding, the district judge would have very broad discretion"); *In re Rosahn,* 671 F.2d 690, 695 (2d Cir. 1982); *Commodity Futures Trading Comm'n* v. *Premex, Inc.,* 655 F.2d 779, 782 n.2 (7th Cir. 1981); *United States* v. *Danenza,* 528 F.2d 390, 392 (2d Cir. 1975). Moreover, petitioner has failed to show how live testimony "would [have] significantly improve[d] the accuracy of the [district court's] determination." *Schall* v. *Martin,* 467 U.S. 253, 277 (1984).

The request to present live testimony was not made in response to the government's motion to compel production of the index cards; it was made only in a subsequent motion for reconsideration of the court's order to compel production (see Pet. App. A12). The district court could properly have refused the request solely on the ground that it was untimely.

Moreover, from all that appears in the petition (Pet. 11), the proposed witnesses would simply have repeated the very claims already contained in the affidavits and letters. It is therefore difficult to understand what the witnesses would have added to the information before the district court when that court made its finding that the index cards were sufficiently involved in Caucus's fund-raising business to be deemed corporate records, regardless of their ownership (see Pet. App. A16).

Finally, as the court of appeals noted (Pet. App. A16), there was a "real possibility that [the witnesses] would not appear at all." Petitioner's request for leave to present testimony was apparently conditioned on the trial court's willingness to immunize the witnesses from grand jury process during their stay in Boston (Pet. App. A12, A15).

In light of the unjustified conditioning of petitioner's request,[6] the district court could properly be skeptical of the likelihood that the witnesses would appear at all. At a minimum, the district court could regard petitioner's unjustifiably qualified proffer of witnesses as no proffer at all. Under these circumstances, and in light of "the overall delay in the grand jury proceedings already caused by Caucus' and the other organizations' refusal to produce anything until forced to do so" (Pet. App. A16), the court of appeals correctly concluded that petitioner received all the process it was due. See *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973) (cautioning against "saddl[ing] a grand jury with minitrials and preliminary showings [that] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"). Cf. *United States* v. *Martin-Trigona*, 759 F.2d 1017, 1025-1026 (2d Cir. 1985) (summary imposition of criminal contempt was appropriate where witness had delayed bankruptcy proceedings for nearly three years with "frivolous appeals" and "collateral litigation").[7]

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[6] Because there is nationwide service of process for grand jury subpoenas, see Fed. R. Crim. P. 17(e), the condition petitioner sought to impose on the appearance of his witnesses was not a valid one.

[7] Petitioner also contends (Pet. 14) that the denial of a full evidentiary hearing violated the First and Fifth Amendment rights of the purported owners of the index cards. As this Court has made clear, however, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). While "there are situations where competing considerations outweigh any prudential rationale against third-party standing," *Secretary of State* v. *J. H. Munson Co.*, 467 U.S. 947, 956 (1984), petitioner has not offered any reason why his case presents such a situation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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